

Fatmabai Vs. Aishabai

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Court : Mumbai

Decided On : Feb-21-1888

Reported in : (1888)ILR12Bom454

Judge : Scott, J.

Appellant : Fatmabai

Respondent : Aishabai

Judgement :

Scott, J.

1. In this suit Fatmabai, as widow of one Haji Adam Haji Ismail, sued Aishabai, also widow of Haji Adam, and claimed a share of the sum which Aishabai had received as such widow, on the ground that she (Aishabai) has forfeited her share by remarriage. Aishabai has replied, amongst other things, that Fatmabai in a previous suit against her put forward a claim, as widow, to money of the late husband in Aishabai's hands, and that the Court in that previous case decided that Fatmabai was not lawfully married to Haji Adam. Aishabai has further replied in the present suit that in the previous suit a sum of money had been awarded to Fatmabai in final settlement of all claims she might have against Aishabai. Aishabai, therefore, now pleads that the question in dispute in the present suit was finally adjudicated in a previous suit between the same parties, and cannot, therefore, be entertained by the Court a second time. She relies, of course, upon

Section 13 of the Civil Procedure Code.

2. That section, as far as it concerns the present case, runs as follows: 'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation I.-The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other. Explanation II.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation III.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.' This section only reproduces in a codified form the law of estoppel by record which is set out at length in the *The Duchess of Kingston's case* and the notes thereon in *Smith's Leading Cases*, Vol. II, p. 812, at p. 830 (9th ed.).

3. The conditions for the exclusion of jurisdiction on the ground of *res judicata* are most succinctly stated in the Roman law cited by Knight Bruce, V.C. in *Barrs v. Jackson* 1. Y. & C.C.C., 585 on App., 1 Phil., 582. There must be the concurrence of *idem corpus*, *eadem quantitas*, *idem jus*, *eadem causa petendi*, *eadem conditio personarum*; and Pothier (*Traite des Obligations*, para. 894,) says: 'De la chose jugee. Pour qu'il y ait lieu à l'exception, il ne suffit pas que la chose que vous me demandiez soit la même que vous m'aviez demandée il faut que vous la demandiez pour la même cause pour laquelle vous l'aviez demandée. Oportet ut sit eadem causa petendi.....la même chose peut m'être due en vertu de plusieurs différentes causes d'obligations: 'and again in para. 896 he says: 'Quelque générale qu'ait été ma première demande on revendication d'une chose le jugement qui en a donné congé ne m'exclut pas de former de nouveau une demande en revendication lorsque je prétends en être devenu propriétaire par un titre survenu depuis le jugement. Car ce jugement en jugeant que je n'étais pas alors propriétaire de cette chose n'établit pas que je n'ai pu en acquérir depuis la

proprie.' This commentary applies literally to the second ground relied upon by Aishabai, viz., that all claims were settled by the previous decision. That suit was brought by Fatmabai as widow against Aishabai as widow. The present suit is brought by Fatmabai as widow against Aishabai remarried. The ground relied upon is a new ground, not known, not in existence, at the time of the former suit-to wit, that Aishabai is no longer a widow, and has, therefore, lost all legal right to the estate of the late husband. There is not the *eadem causa petendi*. There is not the *eadem conditio personarum*; see also *Hunter v. Stewart* 31 L.J. Ch. 346 . I am of opinion, therefore, that, so far as her second ground goes, Aishabai has no claim to an estoppel.

4. The first ground remains for consideration. If Fatmabai was held by the Court in the previous case not to be a widow, she is certainly precluded from coming here for relief a second time as such widow. The former suit was referred to arbitration; an award was made; that award became in due course a consent decree'. There is, therefore, no question as to its not being a judgment of a competent Court. The suit and all matters in difference between the parties were referred to the arbitrators. The prayer of the plaint was that she (Fatmabai) should be declared a lawful wife, and that her share as wife should be found and paid. The written statement denied Fatmabai's marriage. A number of affidavits were filed, with a view to a rule which stood over to the hearing. Those affidavits by consent were allowed to be used as evidence by the arbitrators. I have read them-not, of course, with any intention of reviewing the decision, but with a view of ascertaining what that decision included. The affidavits contain no proof sufficient to establish conclusively that Fatmabai was not married. Thus Aishabai herself only says:' I shall be able to prove at the hearing that Fatmabai was an orphan, brought to India as a slave girl, and was never recognised as a lawful wife.' Fatmabai, on the other hand, in her affidavit, says she can prove both marriage and recognition by the family. The arbitrators only held one meeting. They raised no issues. They called no witnesses. They gave their award without stating their reasons. They did not, in terms, refer to the question of marriage, but they awarded to Fatmabai, in full settlement of all her claims whatsoever upon Aishabai as heir, the sum of Rs. 55,000 out of the estate of the deceased husband, in the hands of Aishabai, and they said that Aishabai, was entitled to the rest. The consent decree adopted the

terms of the award. Thus, on a suit brought by a widow for a share in the estate of her husband, a substantial share was awarded. The inference is irresistible, that the arbitrators, although they were silent on the question of marriage, did not decide it in a sense adverse to the claimant. But, as regards the marriage itself, the question cannot have been controverted, and finally decided in a manner sufficient to establish *res judicata*. The arbitrators had not materials before them sufficient for the purpose. (See, as to the binding force of awards as estoppels, *Newall v. Elliot* 1 H. & C., 797 ; 32 L. J. Ex. 120 I need not cite authorities for the proposition that an award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators. (See Bigelow on Estoppel, p. 64.)

5. But it was argued by the Advocate General with his accustomed skill, that as a declaration was prayed that Fatmabai was lawfully married, and that as such a declaration was not given in express terms, Explanation III of Section 13 of the Civil Procedure Code applies, and, therefore, as the relief claimed was not granted, it must be taken as having been refused. I think that sub-section refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted or refused otherwise the principle that an estoppel must be: certain (see Comyn's Digest 'Estoppel') Would be violated. Here the main relief claimed was the payment of money improperly detained from Fatmabai as widow, and the declaration asked was not an independent head of relief, but was a subordinate claim dependant on the money claim. The money claim is the substance of the suit, and the decree for money is an implied admission of her status as wife, if that status was decided at all. I am of opinion, therefore, the arbitrators were not silent in the sense required to justify the application of Explanation III of Section 13.

6. His Lordship subsequently requested that the question as to the effect of the decree regarded as a release might be argued before him. The case came on again on the 12th March, 1888, for further argument on this point.

7. Latham (Advocate General) for the defendant: The submission and award together constitute a contract-Russell on Awards, p. 8. That contract has now

become part of the record. The words in the latter part of the decree import a release no doubt, but also much more. They really contain a family arrangement carried out by release and assignment-*Stapilton v. Stapilton* 2 White and Tudor's L.C, p. 920, (6th ed.) First, regarding the decree as a release, how shall we ascertain the intention. Usually the intention of a release is ascertained from the recitals. Here the pleadings in the suits are really the recitals, and from them we discover the intention of the parties. From them we find the plaintiff claimed as widow; the defendant alleged that the plaintiff was only a concubine. That point went to arbitration. Then comes the release. It is clear the plaintiffs claim as widow was in contemplation when it was made, and she gives it up on payment of Rs. 55,000. Reliance may be placed on cases in which, after release given, further property has been recovered, as in *Turner v. Turner* 14 Ch. Div., 829 . There, however, the right to share was admitted, and the only question was as to the amount. But here the status of the plaintiff was questioned, and her right to share at all was denied, and she was bought out. Further, she bases her claim in her plaint on an alleged custom of her caste on the remarriage of widows. She must have known of that custom at the date of the release. She must also have known that Aishabai's marriage was possible, and that on such marriage she would by the custom she alleges be entitled to the property. These then were contingent rights possessed by her at the date of the release. All these she gave up by the release.

8. But the decree contains not merely a release, but also a declaration, which amounts to an assignment by Fatmabai to Aishabai of all the rest of the estate.

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9. Would this assignment pass future interests?

10. We say that the claim of Fatmabai on Aishabai's remarriage (if any) was not a future interest, but a present though contingent interest. It was a right similar to that which she might have claimed on Aishabai's death. Aishabai is declared to be entitled to the rest of the estate 'absolutely '. It has been suggested that this gives her no more than a widow's estate. That is not so. This is a legal document; words

of conveyance are to be taken most strongly against the grantor-Bolye Chund Dutt v. Khetterpaul Bysack 11 B. L.R., 459 . In Sreemutty Rabutty Dossee v. Sibchunder Mullick 6 Moo. Ind. Ap., 1 the widow was acting only for her deceased husband.

11. Lastly, we say this was a family arrangement, which was final. It is clear the transaction was regarded as a compromise of a doubtful right. The arbitrators do not come to an express finding as to whether Fatmabai was lawful wife or not, but give her a sum of money to induce her to relinquish her claim. The easements discussed in the notes to Stapilton v. Stapilton 2 White and Tudor's L.C., p. 920, (6th ed.) apply here.

12. Inverarity proposed to address the Court.

13. Jardine objected to a second counsel being heard. The case is down for hearing. It is true it is on a preliminary issue, but that can make no difference. Two speeches by separate counsel for the defendant are not allowed at the hearing of a case. The points raised here are, no doubt, points of law, but if two counsel are heard for that reason, then in every case in which the issues raise points of law two counsel must be heard. There is nothing to distinguish a hearing on a preliminary issue from the ordinary hearing of a case.

14. Inverarity: A preliminary issue is analogous to a demurrer. He cited Chitty's Archbold, p. 642.

Latham': Mr. Lang and Mr. Telang were both heard in the former argument of this case.

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15. I have consulted Bayley, J., and he agrees with me that two counsel ought to be allowed to address the Court.

16. Inverarity: This was clearly a family arrangement, and the release in the decree was a complete release to the estate. The fact that the attorneys of the parties were the arbitrators, is strong evidence to show that the settlement was

intended to be final. The plaint in Suit No. 227 of 1882 stated that Aishabai had Rs. 1,50,000 of the estate in her hands. If Fatmabai was the lawful widow, she was entitled to share in that. She consented to take less than a half share, and to give up all claim against the estate.

17. Jardine for the plaintiff, contra: There is no evidence that this was a family arrangement. The document before the Court is simply a decree.

18. By the decree Rs. 55,000 is paid to Fatmabai, and a balance is left in Aishabai hands. Fatmabai's claim in Suit No. 227 of 1882 was as a widow. The decree was made in that suit, and she got the Rs. 55,000 in full settlement of the decree. The real point of dispute in that suit was whether Fatmabai was to be regarded as the widow of Haji Adam or not. The decree recognised her as such, and effected a partition of the estate between them as widows. The word 'absolutely' merely meant that neither was to interfere with the other in the enjoyment of her share. Aishabai could not take more than a widow's interest-Sreemutty Rahutty Dossee v. Sibehunder Mullick 6 Moo. Ind. Ap., 1. The decree is to be interpreted having regard to the circumstances in which it was passed and what was contemplated by the parties. The only point at issue was whether Fatmabai was entitled to a widow's share-Lyall v. Edwards 6 H, & N., 337; 30 L.J. Ex., 193 . The present claim is as to a new accretion-Turner v. Turner 14 Ch. Div. 829 .

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19. There is no doubt that a release though expressed in general terms may be restrained to what was the intention of the parties, but that intention must be found in the facts of each case. What, then, are the facts of this case? Haji Adam dies, leaving considerable property. Aishabai, the present defendant, brings, a suit, (No. 616 of 1879), to establish her right as his widow to that property, and obtains a decree for nearly two lakhs of rupees. Fatmabai, the plaintiff, brings a suit, No. 227 of 1882, as another widow of the deceased, for her share of what was awarded to Aishabai. Aishabai denies in that suit that Fatmabai was either legally married, or acknowledged as a wife. Interrogatories are administered, and a number of affidavits filed on either side. Aishabai says she is able to prove that Fatmabai was

an orphan slave girl, and never lawfully married; and relies on the description of herself as 'wife' and of Fatmabai as 'another woman Fatmabai, a Georgian slave of my son' in the will of her husband's father. Fatmabai, on the other hand, says she is prepared to prove both her marriage and an acknowledgment of her as wife. The suit, obviously of a painful character to the family, instead of being fought out in Court is referred to the arbitration of Mr. Cumrudin Tyabji and Mr. Bhaishankar, solicitors of the plaintiff and defendant respectively. The arbitrators do not take fresh evidence, as the parties agree that 'all the points in difference are contained in the affidavits,' which are admitted as evidence. The whole proceedings are of a non-contentious character. The partners of the two arbitrators appear for the parties in the suit. There is only one meeting, no issues are settled, and finally the arbitrators give their award without reasons, allotting to Fatmabai Rs. 55,000. The award is subsequently by agreement of the parties embodied in a consent decree. That decree recites, first, the prayer of the plaint-next, the reference ordering that the suit and all matters in difference should be referred to the arbitration of Messrs. Tyabji and Bhaishankar-and then the Court proceeds to pass judgment, according to the award, in the following terms, which are the terms of the award, and contain the words I have now to construe, viz. 'that the said Aishaibai do pay to Fatmabai's attorneys the sum of Rs. 55,000 in full settlement of ail and singular the claims of Fatmabai in the estate of the deceased whatsoever and wheresoever ', and the decree further declares that, upon the payment of the said sum, all claims whatsoever of Fatmabai upon the estate of the deceased in the hands of any person whatsoever or upon Aishabai as heir of the deceased personally, or otherwise, shall be considered to have been fully satisfied by Aishabai and absolutely waived for ever by Fatmabai and it finally declares that Aishabai is entitled absolutely to all the rest of the estate and effects of the deceased as her sole property as against Fatmabai.

20. It is important to observe, first, that the award here set out goes much beyond the submission in the clauses declared to be abandoned, and yet it is adopted *ipsisssimis verbis* by the parties in the consent decree; and secondly, that the arbitrators, both lawyers, never touched the question of wife or no wife, whilst they gave Fatmabai much less than the moiety claimed. This decree was passed and the money paid in 1883.

21. The next incident in the history of the case is that Aishabai remarried in October, 1886. Fatmabai then filed her plaint in the present suit, praying that it might be declared, first, that Aishabai by her remarriage has forfeited all right and interest in the property of the deceased, and second, that Fatmabai being now sole widow of the deceased is entitled to all his property in the hands of Aishabai. The case then came on for hearing before me on the following preliminary issue, namely, 'whether the plaintiff is not precluded from bringing this suit or obtaining the relief prayed by reason of the proceedings in Suit No. 227 of 1882, and the award and decree therein.' I have already found that the defence of *res judicata* was not sustainable on that decree. But on the defence, that the award and decree constituted a valid and binding release, conveyance, or final settlement of all claims whatsoever Fatmabai might have upon Aishabai, I asked for further argument, and the matter was fully and ably re-argued a fortnight ago.

22. After giving the matter most careful and anxious consideration I have come to the following conclusion. It is settled law that the general terms of a release do not include questions that could not have been in the contemplation of the parties See Story's Equity Jurisprudence, Section 145. Pollock on Contracts, p. 475. Now, was this present claim of Fatmabai on Aishabai in the contemplation of the parties-or ought it to be reasonably supposed to have been in their contemplation at the date of release? The claim did exist at the time in the sense of its being a present right to a contingent interest, the contingency not. having yet arisen. Was the contingency, i.e. the remarriage of Aishabai, so improbable that it escaped consideration? Fatmabai cannot be considered to have been ignorant of her alleged right to the whole on the remarriage, as she brought this suit at once on that event occurring, and she set up a custom which can only be proved on the basis of frequent remarriages in her community. I do not think it was a right Fatmabai was likely to overlook.

23. Another way, no doubt, of considering whether the release covers such a right is to look at the recitals, or at what stands, in this case, in the place of recitals, which are always used as a key to the construction of the general words of a release-*Boyes v. Bluck* 22 L.J.C.P. 173 .; *Simons v. Johnson* 3 B. & Ad., 175; *Lyll v. Edwards* 6 H.& N., 337 : 30 L.J. Ex. 193 . That is to say, we must look at the

terms of the reference, which is of 'the suit and all matters in difference between the parties'; and we must next consider, from the pleadings, what were 'the matters in difference.' We find them to be a claim on the part of Fatmabai as widow, and a denial of the claim and of the widowhood on the part of Aishabai. That was the matter in difference which was referred to arbitration. If the operative words are to be wholly controlled by the recitals in all cases, I should, I think,' be bound to hold that the award referred to the matter in difference only, and that the right intended to be released by general words was only Fatmabai's right as widow on the estate in Aishabai hands as widow. But the operative words must not be controlled and interpreted by the recitals only. They are one of the tests of the intention of the parties, which must be inferred from all the circumstances. In short, every case must stand on its own facts, and the facts here are (1) no issues were raised; (2) there were no direct findings on the precise points in dispute; (3) the sum awarded to Fatmabai was less than one-half which she would have taken as widow; (4) the arbitrators never, in terms, decided the main question at all (5) although the award was defective from want of findings on all the matters in difference, there was no objection taken by either side to its validity; (6) that, in short, the arbitrators diverged from the submission, and the parties consented to the divergence. All these facts made me think there was a distinct intention amongst all the parties that the decision arrived at by the arbitrators should be treated by all the parties as a sort of final compromise and settlement, not only of the disputes submitted, but of all the disputes that could arise between the two ladies as regards the estate of the deceased husband. This view accounts for the comprehensive terms of the operative part of the release, whose introduction otherwise it is almost impossible to explain. It can hardly be said that the terms have no meaning. Two experienced lawyers conducted the case for the parties, and two other experienced lawyers acted as arbitrators, and gave the award such terms as 'all claims whatsoever upon the estate shall be absolutely waived for ever 'and' Aishabai is entitled absolutely to all the rest of the estate as her sole property as against Fatmabai '. These words would not have been used by able lawyers, nor would they have been adopted by the parties who were acting under advice in their consent decree, if they had not intended to settle all possible claims. It seems to me the consent decree was a sort of family arrangement intended to finally

close very disagreeable litigation.

24. If I am right in my view of the award and decree, viz-, that when read by the light of the facts and circumstances they must be taken as a final settlement of all disputes, then the particular claim put forward by the present suit must be taken to be included, unless it was non-existent at the time. But, as I have already said, it was a present right dependent on a contingency, and did then exist just as much as a right contingent on a death exists. Remarriage clearly, in Fatmabai's opinion, obtains in her community, as she bases her claim on a custom by which Aishabai forfeits the estate of her husband whenever she takes to herself a second.

25. I think, therefore, the terms used must be held to cover, and to have been intended to cover, Fatmabai's rights in case of Aishabai's remarriage. It was argued that this question 'is concluded by the decision of the Privy Council 6 Moore Ind. Ap., p. 1, and that I am bound to hold that Fatmabai only waived her right on the property so far as it was a widow's estate in the hands of Aishabai. In that case by a family arrangement a childless Hindu widow was given Rs. 55,000 'for her sole absolute use and benefit'. Yet in spite of these words she was held to have taken, with reference to her husband's representatives, only a widow's estate, and not an estate to her separate use in the English sense. But their lordships say the money was given for her absolute use as against the parties to the deed, and that the deed was intended to settle all accounts between the parties. Applying that decision to the present matter, I should say that as against Fatmabai, a party to the release, Aishabai held absolutely, although, as against other members of the husband's family, Aishabai may only hold a widow's estate. If I were to follow the case cited in *Bolye Chund Butt v. Khetterpaul Bysack* 11 B. L.R., 459 there would be no difficulty in saying that Fatmabai intended to convey an absolute estate, as the words here are as strong, if not stronger, than the words which the Court had to construe in that case.

26. I think, on the whole, the award and release must be held to constitute a binding agreement by which Fatmabai, for the sum of 55,000 rupees, waived all her rights against Aishabai, including the present claim. I, therefore, decide the preliminary issue in favour of the defendant. The suit must be dismissed with

costs.

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